No. 87-1458

In the Supreme Court of the United States

OCTOBER TERM, 1987

TERRY L. ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Merit Systems Protection Board, sustaining the removal of petitioners from their positions as air traffic controllers for participating in an illegal strike, was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 827 F.2d 1564. The final decision of the Merit Systems Protection Board (MSPB) regarding the petitioners in Group 1[1] (Pet. App. 33a-114a) is unreported. The final decision of the MSPB regarding the petitioners in Group 2 (Pet. App. 133a-144a) is reported at 27 M.S.P.R. 690.

JURISDICTION

The judgment of the court of appeals (Pet. App. 145a) was entered on September 3, 1987. A petition for re-

[1] Petitioners have divided themselves into two groups (Pet. ii-iii) to reflect the different procedural routes they followed to the court of appeals.

hearing was denied on October 19, 1987 (Pet. App. 146a). A suggestion for rehearing *en banc* was denied on December 1, 1988. The petition for a writ of certiorari was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are former air traffic controllers. In 1981 they were removed from their jobs at the Chicago Air Route Traffic Control Center for participating in an illegal strike called by their union, the Professional Air Traffic Controllers Organization (PATCO). Petitioners were among 11,000 controllers nationwide who were dismissed by the Federal Aviation Administration (FAA) for taking part in the strike. See *Schapansky* v. *Department of Transportation,* 735 F.2d 477, 481 & n.4 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984).

Petitioners sought review of their removals from the Merit Systems Protection Board (MSPB or the Board) pursuant to 5 U.S.C. 7513. By statute, the MSPB could sustain the removals only if the FAA proved by a preponderance of the evidence that each employee participated in the illegal strike (5 U.S.C. 7701). In support of its charges, the FAA relied principally upon its attendance records, which consisted of watch schedules to establish when petitioners were supposed to have reported for work and sign-in logs for each shift to establish that petitioners failed to report as required (Pet. App. 43a-46a).

Petitioners attempted to challenge the reliability of the FAA's records by introducing what they claimed were the "original" sign-in logs and pointing to a number of discrepancies between these original logs and those introduced by the FAA (Pet. App. 47a-48a). Petitioners claimed that the FAA "doctored" the logs "in order to support the removal actions it had taken" (*id.* at 47a (foot-

note omitted)). Petitioners successfully opposed attempts by the FAA to introduce evidence "concerning when (if ever) the file sign-in logs were changed, who changed them, for what purpose they were changed, and which sign-in logs are more accurate" (*id.* at 48a, 104a-105a n.14). Petitioners themselves, however, "produced absolutely no evidence concerning these two sets of sign-in logs" (*id.* at 105a n.14).

The presiding official concluded that there was no evidence to indicate that the sign-in logs "were altered by the agency in an improper attempt to influence the outcome of these proceedings" (Pet. App. 48a). He therefore found that the records "cannot be totally disregarded as probative evidence" and were sufficient to establish a prima facie case of striking as to each petitioner (*id.* at 48a-49a). The presiding official further found that petitioners had failed "to rebut the agency's *prima facie* showing that they participated in the strike" (*id.* at 78a). Very few of the petitioners availed themselves of the opportunity to testify, and none of those who did testify claimed that he reported for work during the strike or that he signed a sign-in log. *Id.* at 49a-78a. After weighing all of the evidence, the MSPB's presiding official sustained petitioners' removals on January 18, 1983 (*id.* at 33a-114a).[2]

2. The Group 1 petitioners elected not to seek review from the full MSPB and allowed the presiding official's decision to become the final decision of the Board (see 5 C.F.R. 1201.113). They then appealed to the United States Court of Appeals for the Federal Circuit (see 5 U.S.C. 7703). The Group 2 petitioners submitted a petition for review to the full MSPB (see 5 C.F.R. 1201.113-1201.117).

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[2] Seven other employees were ordered reinstated on a variety of grounds, none of which concerned the reliability of the records introduced by the FAA. See Pet. App. 54a-59a, 63a-66a, 73a-75a, 97a.

The Board granted their petition on February 8, 1984, and remanded the case to the presiding official to take additional evidence (Pet. App. 115a-120a). The Board noted that the FAA relied principally upon its attendance records to establish petitioners' absences during the strike and that the records in question were produced "under unusual circumstances and with some inaccuracy" (*id.* at 120a). The Board acknowledged that the records might be "consistent enough to conclude that more likely than not an individual was striking and AWOL on at least one of the days charged," but nonetheless urged the presiding official "to consider the need for eyewitness testimony explaining the process by which the records were created" (*ibid.*). The Board cautioned that "[i]f the written record is to speak for itself we must be sure that it is accurate" (*ibid.*).

Following a further hearing on remand, the presiding official issued a second decision affirming the removals of the Group 2 petitioners (Pet. App. 121a-131a). The presiding official examined all the record evidence submitted by the FAA—watch schedules, sign-in logs and time and attendance reports (T & A's)—and concluded that the evidence reliably established that each of the Group 2 petitioners participated in the strike. More specifically, the presiding official found that "the watch schedules are reliable and, in the absence of a specific challenge by any [petitioner], accurately reflect [petitioners'] shift assignments during the period in question" (*id.* at 124a-125a (footnote omitted)). With respect to the sign-in logs, the presiding official noted that the names of three of the controllers[3] had been added to a log after the end of a shift, but that in each instance an agency official testified, without contradiction, that "the employee's

[3] Only one of the three, Gregory G. Nelson, is a petitioner in this Court.

name had been inadvertently omitted from the sign-in log for a shift to which he was assigned as per the watch schedule" (*id.* at 125a). He further explained (*ibid.*):

> As previously noted the watch schedule is the official document which determines an employee's assigned shift. In this regard, the presence or absence of an employee's name on a sign-in log is not nearly as significant as the presence or absence of the employee's signature on the document. The witnesses consistently testified that no signatures were erased from any sign-in logs. Moreover, none of the [petitioners] has alleged that he did appear on the dates in question.

The presiding official found that the sign-in logs for the period were trustworthy and that "the T & A's appropriately reflected each [petitioner's] status during the applicable period" (Pet. App. 126a). He further stated that there was "no persuasive evidence that any agency official perjured himself, attempted to 'make' or 'rig' a case against [a petitioner], or otherwise committed an act which might be considered fraudulent" (*ibid.*). The presiding official accordingly concluded that the agency had sustained its burden of proving, with respect to each of the Group 2 petitioners, that he or she "was absent without authorization on one or more days during the strike, and that each failed to report for his/her 'deadlin[e] shift' " (*id.* at 127a).

The Group 2 petitioners again petitioned the full MSPB for review. The Board denied the petition on July 5, 1985 (Pet. App. 133a-144a), holding that the presiding official had properly weighed all the evidence in determining that the FAA's records were reliable for the purpose for which they were offered. The petitioners in Group 2 then sought review in the Federal Circuit.

3. The court of appeals affirmed the decisions of the MSPB as to both groups of petitioners in a decision issued on September 3, 1987 (Pet. App. 1a-32a).[4] With respect to the Group 2 petitioners, the court noted that substantial evidence supported the board's finding "that there was no attempt on the part of the FAA to make or rig a case against any petitioner or otherwise commit a fraudulent act" (*id.* at 16a). The court further found substantial evidence that the agency's records were accurate and reliable for the purposes for which they were offered. "Because of their reliance on a broadside attack against the FAA's case," the court noted (*ibid.*), "petitioners have * * * failed to address or counter in any way the crucial findings of the presiding official on the accuracy and the reliability of the documents as they relate to the individual petitioners involved in the remand proceeding." The court reviewed the agency's documentary evidence in detail and found that, while additions had been made to the FAA's records, the additions had not affected those parts of the documents that were relevant to the issue for which they were offered (*id.* at 19a). Because petitioners failed to rebut the FAA's evidence, their removals were properly sustained (*id.* at 19a-20a).

With respect to the Group 1 petitioners, the court stated that "because there is no evidence of tampering—not even a suggestion that a signature was expunged from a sign-in log to manufacture a case against someone—we affirm the presiding official's finding that the records were not 'doctored' to manufacture evidence for the MSPB proceedings" (Pet. App. 23a). The court also rejected petitioners' suggestion that the records as a whole were either inadmissible or too unreliable to constitute substantial evidence against them. The court noted that "[w]hile their challenges to the removal actions were consolidated for convenience of trial, each controller has a separate claim for wrongful removal" that must be judged according to the evidence pertaining to that individual. Yet, "[n]ot one of the petitioners in the instant cases has asserted that information contained in his or her adverse action file was wrong either with respect to a shift assignment or his or her absence from a scheduled shift." *Id.* at 26a. The court accordingly declined to require the FAA "to prove the accuracy of every entry in order to use any part of the record as evidence" (*id.* at 28a).[5]

[4] Although the court of appeals heard the appeals of both groups together and issued only one decision, it considered the records separately and did not consolidate the appeals (Pet. App. 3a).

ARGUMENT

The fact-bound decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, no further review is warranted.

1. Petitioners repeat (Pet. 14-19) their claim that the FAA has so tampered with the record evidence as to make that evidence either inadmissible or wholly unreliable. The FAA established its prima facie case by introducing petitioners' watch schedules, which established when each controller was required to work, and sign-in logs for each shift during the strike, which established whether a controller had reported for work as scheduled.[6] Petitioners'

[5] Senior Judge Baldwin dissented, arguing that the agency's "unreliable documentation created a record that is so flawed, in the first instance, as to undermine its probative value, and prevent the establishment of a prima facie case" (Pet. App. 31a).

[6] In *Dorrance* v. *Department of Transportation*, 735 F.2d 516, 519 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984), the court had previously held that the FAA could establish a prima facie case of absence during the strike based solely upon work schedules and sign-in logs.

challenge is directed chiefly at the sign-in logs.[7] With respect to that issue, the court of appeals explained (Pet. App. 5a):

> Personnel sign-in logs were prepared by a supervisor of a particular shift, usually one day in advance, by inserting on the form the names, taken from the watch schedule, of the employees assigned to that shift. Included on the sign-in log form were columns for the employee to sign or initial opposite his or her name and to record his or her time on and off, and a column headed "hours on leave." In the latter, a notation may indicate hours of sick, annual or other approved leave.

As the court of appeals and the MSPB's presiding official held, the presence or absence of signatures or initials were the "critical features of the documents" (Pet. App. 18a, 19a). If present, the controller's attendance at work was established; if absent, the controller's failure to report was established unless there was other evidence to the contrary.

Petitioners focus not upon the presence or absence of signatures, however, but upon the fact that additions were

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[7] The board's presiding official found that the watch schedules were reliable and accurately reflected petitioners' shift assignments (Pet. App. 124a-125a). In sustaining the Board's finding on this issue, the court of appeals stated (Pet. App. 16a-17a):

> Petitioners * * * made no specific allegations of changes in shift assignments for any of the petitioners in the remand proceeding and the presiding official's finding that there were no such changes remains unchallenged. If there were in fact errors in the shift assignments as to those petitioners, they could have identified them to the FAA or in the MSPB proceedings. In the absence of any showing of a specific mistake for any individual petitioner, the presiding official's finding of accuracy in the watch schedule shift assignments must stand.

made to the sign-in logs and other records after the end of shifts. Petitioners repeatedly describe these additions as "inculpatory entries" (Pet. 11, 17), but there is nothing in the record to suggest that the challenged additions were regarded as "inculpatory" by the FAA, the Board, or the court of appeals, or that they were accorded any weight. Thus, the court of appeals rejected petitioners' argument that AWOL notations added after some names were relied upon by the FAA as evidence that petitioners were actually absent. Rather, the court of appeals held, "[t]here is no indication * * * that weight was given to the AWOL notation" (Pet. App. 19a).

Petitioners have argued consistently that the additions to the logs "spoiled" them as evidence (Pet. i, 17). Equally consistently, this argument was rejected by the MSPB's presiding official, the full Board, and the court of appeals. The logs introduced into evidence by the agency were identified by the supervisors who prepared and maintained them on the floor of the air traffic control facility. While the supervisors could not identify all of the additions made to the logs after the end of the shift, their testimony established that the logs had been on the floor of the facility during the relevant shifts and, thus, would have been signed by petitioners if they had reported for work as scheduled (Pet. App. 17a-18a). There has never been the slightest suggestion that any alteration was made in the signatures and initials on the logs, or that any signatures or initials were deleted from the logs.

Both the court of appeals and the Board gave careful consideration to petitioners' allegations of misconduct. The Board's presiding official heard extensive testimony from the agency's witnesses on the extent to which additions were made to the logs and the reasons for those additions. Those witnesses were subjected to lengthy and

vigorous cross-examination. Having heard and seen the agency's witnesses testify, the presiding official found them to be credible and the documentary evidence to be reliable (Pet. App. 126a-127a).

Upon review, the court of appeals properly gave deference to the presiding official's decision to credit the testimony of the agency's witnesses (Pet. App. 15a-16a, citing *Hambsch* v. *Department of Treasury,* 796 F.2d 430, 436 (Fed. Cir. 1986); *Griessenauer* v. *Department of Energy,* 754 F.2d 361, 364 (Fed. Cir. 1985)). Furthermore, the court of appeals itself "examined carefully the discrepancies noted by petitioners," but could not find fault with the presiding official's determination (Pet. App. 15a). Contrary to petitioners' assertion, therefore, this case does not concern "public confidence in the integrity of the MSPB" (Pet. 14). Nor does it raise questions concerning the appropriate response to evidence of litigation misconduct.[8]

2. Petitioners also argue (Pet. 19-20) that the court of appeals erred in affirming their removals because they were denied an opportunity to make a "meaningful" oral reply to the FAA official who decided to remove them, in violation of 5 U.S.C. 7513(b)(2) and their due process rights. Section 7513(b)(2) provides that "[a]n employee against whom an action is proposed is entitled to * * * a reasonable time * * * to answer orally and in writing and to furnish other documentary evidence in support of the

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[8] There was no indication that the evidence presented by the agency was manufactured or fraudulently altered for purposes of the removal hearings. Petitioners' reliance (Pet. 17-20) on *Palmer* v. *Hoffman,* 318 U.S. 109 (1943), and *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U.S. 238 (1944), in support of their contention that the FAA's records should have been excluded in their entirety is, therefore, completely misplaced.

answer." *Cleveland Bd. of Educ.* v. *Loudermill,* 470 U.S. 532, 546 (1985), upon which petitioners also rely, holds that due process requires that a tenured public employee be given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

Petitioners here were accorded both due process and the opportunity for an oral reply provided by Section 7513(b)(2). They received written notice of the charges against them, an opportunity to review the FAA's evidence, and an opportunity to respond both orally and in writing. They allege that the individuals who heard their oral replies did not have authority to make or recommend final decisions on their cases. As the MSPB's presiding official found, however, all the oral reply officials were experienced current or retired FAA supervisors and many of them did make recommendations to the FAA official with final authority. Moreover, in at least eight cases, the deciding official relied upon information presented during the oral replies to decide not to remove a controller charged with striking. Pet. App. 92a-93a. Thus, contrary to petitioners' contention, the oral reply process was meaningful and each petitioner was given "an opportunity to present his side of the story" (470 U.S. at 546) prior to termination. In the absence of more specific allegations concerning the procedures afforded individual controllers, petitioners' broadside attack upon the removal process must fail.

The court of appeals did not find, as petitioners assert (Pet. 19), that the FAA violated their right to an oral reply. Rather, the court found it unnecessary to reach that question because it concluded that even if that right had been violated, petitioners had failed to demonstrate that the alleged procedural error was harmful (Pet. App. 21a,

citing *DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985); *Handy* v. *USPS*, 754 F.2d 335, 337 (Fed. Cir. 1985)). That conclusion is clearly correct. As the MSPB's presiding official found, "[a]lmost without exception, all [petitioners] merely rested on the record and refused to make any substantive comments on the charges against them. In view of this record, [petitioners] have not met their burden of showing that had another official been present (or had the oral replies been handled differently) the final agency results might have been different" (Pet. App. 94a (footnotes omitted)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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